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Supreme Court, U.S.
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No. 05-903 JAN 17 2006

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IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHIRO, ET AL.,
PETITIONERS,

-vs-

WARREN WESLEY SUMMERLIN,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1982, Respondent Warren Wesley Summerlin was sentenced to death by a Maricopa County Superior Court judge. In 1985, after the conviction and sentence were affirmed on direct review, the same Maricopa County Superior Court judge conducted a post-conviction evidentiary hearing. After hearing from numerous witnesses, he rejected Summerlin's ineffective assistance of sentencing counsel claim, holding that counsel's allegedly deficient performance did not affect the sentence imposed. In 2005, the Ninth Circuit, after considering essentially the same evidence of deficient performance the state post-conviction court had considered, granted federal habeas relief on the basis that there was a reasonable probability that Summerlin's sentence would have been different but for counsel's allegedly deficient conduct.

Did the Ninth Circuit depart from *Strickland v. Washington*, 466 U.S. 668 (1984), when it concluded that Summerlin was prejudiced by his counsel's performance at the sentencing phase of his trial, when the very judge who sentenced Summerlin subsequently considered the evidence Summerlin now claims should have been presented by counsel and ruled that it would not have changed Summerlin's sentence?

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment denying federal habeas relief on Summerlin's state death sentence, finding that sentencing counsel was constitutionally ineffective and that counsel's ineffectiveness prejudiced Summerlin's judge-sentencing proceeding. *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005) (*en banc*) (Appendix A); *Summerlin v. Stewart*, No. Civ 86-584-PHX-ROS (Nov. 13, 1997) (D. Ariz.) (Appendix B); *see also Schriro v. Summerlin*, 542 U.S. 348 (2004); *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) (*en banc*); *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001), withdrawn, 281 F.2d 836 (9th Cir. 2002); *State v. Summerlin*, 675 P.2d 686 (1984).

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on October 17, 2005. Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

In 1982, Respondent Warren Wesley Summerlin was sentenced to death after being convicted of sexually assaulting and murdering Brenna Bailey in April 1981. Bailey, who worked for a finance company, failed to return from a house call to discuss an outstanding debt with Summerlin's wife. *Schrivo v. Summerlin*, 542 U.S. 348, 350 (2004). An anonymous woman (later identified as Summerlin's mother-in-law) called the police and accused Summerlin of murdering Bailey. *Id.* Bailey's partially nude body, her skull crushed, was found the next morning in the trunk of her car, wrapped in a bedspread from Summerlin's home. *Id.* Police arrested Summerlin and later overheard him make incriminating statements to his wife. *Id.* Following a jury trial, Summerlin was convicted of first-degree murder and sexual assault. *Id.*

Prior to sentencing, Maricopa County Superior Court Judge Philip Marquardt held an aggravation/mitigation hearing.¹ Summerlin had been examined prior to trial by several mental health experts, including Dr. Donald Tatro. Summerlin personally requested that Dr. Tatro not testify at the hearing, and Summerlin and his counsel instead requested that the court consider Dr. Tatro's report, which was attached to the presentence report. (Tr. 7/8/82, at 12.) Judge Marquardt considered the report, as well as testimony presented by psychiatrists Otto Bendheim and Maier Tuchler, who had originally been appointed by the court at the request of the defense to conduct a pre-trial mental health examination. Drs. Bendheim and Tuchler testified at the State's request and indicated that, although Summerlin suffered from personality disorders and had various disabilities, including illiteracy, he was competent and not significantly impaired. (*Id.* at 15, 22-24.)

1. In 1982, Arizona law required a judge, rather than a jury, to make findings regarding aggravating circumstances, and to make the sentencing decision. *See Ring v. Arizona*, 536 U.S. 584 (2002).

At sentencing a few days later, Judge Marquardt found two aggravating circumstances (a prior felony conviction involving the use or threatened use of violence, and commission of the offense in an especially cruel, heinous, or depraved manner) and no mitigation sufficiently substantial to warrant leniency. (Tr. 7/12/82, at 12.) The Arizona Supreme Court independently reviewed the trial court's sentencing decision and similarly found two aggravating circumstances and no mitigating circumstances sufficient to call for leniency. *State v. Summerlin*, 138 Ariz. 426, 435-36, 675 P.2d 686, 695-96 (1983).

In state post-conviction proceedings, Summerlin asserted that his attorney, George Klink, had been constitutionally ineffective at trial and sentencing. Six months after this Court decided *Strickland v. Washington*, 466 U.S. 668 (1984), Judge Marquardt held a multi-day evidentiary hearing on Summerlin's claim. Klink, Summerlin, Maria Regina (who represented Summerlin prior to trial), two psychiatrists and others testified at the hearing. After considering the testimony and evidence presented, Judge Marquardt concluded that Summerlin had failed to establish constitutionally deficient performance by counsel at trial or sentencing. Judge Marquardt further found that Summerlin had failed to demonstrate a reasonable probability of a different result. (Appendix C, at 1-3.)

"Protracted state and federal habeas proceedings followed." *Schriro v. Summerlin*, 542 U.S. at 350. After reviewing the record, the District Court concluded that Summerlin had failed to demonstrate that he was prejudiced by Klink's representation at sentencing, and denied Summerlin's federal petition for writ of habeas corpus. (Appendix B, at 10-12.)

Summerlin appealed that ruling to the Ninth Circuit, and a three-judge panel denied relief. *Summerlin v. Stewart*, 267 F.3d 926, 948 (9th Cir. 2000). The Ninth Circuit agreed to consider the case *en banc*, however, and the panel decision was withdrawn. *Summerlin v. Stewart*, 281 F.3d 836 (9th Cir. 2002).

An *en banc* majority reversed, holding that Summerlin's counsel was constitutionally deficient at sentencing and that

Summerlin was prejudiced by counsel's deficient performance. (Appendix A, at 28, 34.)

Judge O'Scannlain disagreed and dissented on the basis that, at the time of sentencing, "practically all of the mitigating evidence was in fact before the sentencing judge." (*Id.* at 35-37.) Judge O'Scannlain further indicated his agreement with the district court's determination that "Summerlin failed to demonstrate a reasonable probability that but for counsel's constitutionally deficient performance, he would have received a lesser sentence." (*Id.* at 35.)

The Ninth Circuit stayed the mandate to allow Petitioners to seek certiorari review.

REASONS WHY THE WRIT SHOULD BE GRANTED

Under *Strickland*, a defendant who challenges his counsel's effectiveness at sentencing must demonstrate (1) deficient performance on the part of counsel, *and* (2) resulting prejudice, that is, a reasonable probability that absent counsel's errors, the sentencer would have imposed a different sentence. 466 U.S. at 687. This case presents the important question of how the prejudice analysis should be conducted by a federal habeas court when the sentencer was a judge who, at a post-conviction hearing, heard virtually all of the mitigating evidence that counsel failed to present at the initial sentencing hearing, and concluded that it would not have affected the sentence he imposed. In such a case, we submit, especially heightened deference to the state court finding is warranted. The Ninth Circuit in this case did not give adequate deference to the trial court's conclusion that the deficient performance did not affect the sentence imposed. This Court should grant certiorari and reverse.

As a general rule, the performance and prejudice components of the ineffectiveness inquiry under *Strickland* are mixed questions of law and fact. 466 U.S. at 697-98. In pre-AEDPA² cases such as this

2. The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. (continued...)

one, questions of law are reviewed *de novo* on federal collateral review, while questions of fact are presumed correct if fairly supported by the record. *See 28 U.S.C. § 2254 (d)(8) (1996); Miller v. Fenton*, 474 U.S. 104, 112 (1985).

In the present case, the state court's holding regarding the prejudice prong is essentially a factual finding, and that finding should be upheld because it is clearly supported by the record. The very judge who sentenced Summerlin conducted Summerlin's post-conviction proceeding and found that the alleged deficient performance did not affect Summerlin's death sentence.

Unlike a situation in which a reviewing court must determine whether allegedly deficient performance by counsel affected a jury verdict or a sentence imposed by a jury, the legal analysis in the instant case is resolved by the trial court's ruling on that issue on post-conviction review. There is no need to speculate as to what the trier-of-fact would have done if presented with the evidence Summerlin developed in the post-conviction proceeding. We know exactly what the trier-of-fact would have done because the trial judge ruled that the evidence would not have changed the sentence *he* imposed. Accordingly, the presumption of correctness that should be accorded the factual determination by the state courts on this issue is essentially unchallengeable, and the Ninth Circuit clearly erred by reversing the district court's ruling denying Summerlin's ineffective assistance of counsel claim.

Summerlin will undoubtedly argue that the Ninth Circuit considered additional evidence beyond that considered by the trial court, and thus the Ninth Circuit is not bound by the state court's

2. (...continued)

104-132, 110 Stat. 1214 ("AEDPA"), requires greater federal court deference to state court rulings. *See 28 U.S.C. § 2254 (d)*. The AEDPA also provides that a factual finding by a state court shall be presumed correct and can only be rebutted by clear and convincing evidence. *28 U.S.C. § 2254 (e)(1)*. However, even prior to the enactment of the AEDPA, state court factual findings were presumed correct if fairly supported by the record.

assessment of the prejudice prong of the *Strickland* analysis. However, as noted by Judge O'Scannlain in his dissent from the *en banc* ruling, that is not the case. The *en banc* majority looked at essentially the same mitigation that was in the record during Summerlin's 1983 sentencing and during his 1985 post-conviction proceeding.

Evidence Relied on by the Ninth Circuit

The Ninth Circuit majority cited extensively to testimony from the state court post-conviction proceeding, *see Summerlin*, 427 F.3d at 631-33, in finding that the following mitigation should have been developed further at sentencing: (1) learning disabilities that left Summerlin "functionally mentally retarded"; (2) explosive personality disorder with impaired impulse control; (3) paranoid schizophrenic diagnosis; (4) organic brain dysfunction; (5) borderline personality disorder; (6) psychomotor epilepsy; (7) electroshock treatments; (8) anti-psychotic medication treatment; (9) lack of awareness of motives underlying his behavior; (10) physical and mental abuse in childhood, including punishment by being locked repeatedly in a room with ammonia fumes; (11) Summerlin's mother was an alcoholic; (12) Summerlin's father deserted him and was later killed in a police shoot-out, and (13) Summerlin's lack of a significant criminal history. (Appendix A, at 12, 31-32.)

Evidence Before the Trial Court at Sentencing

Except for the allegation of electroshock treatments and being locked in a room with ammonia fumes, the information relied on by the Ninth Circuit was before the sentencer at the time of sentencing. At a pre-sentence hearing, the court was aware of an opinion by Dr. Leonardo Garica-Bunuel that Summerlin might suffer from psychomotor epilepsy. Dr. Bendheim testified, however, that neither he nor a neurologist could confirm such a condition. (Tr. 7/8/82, at 16-20.) In the over 20 years since, there has been no additional evidence of Summerlin suffering from psychomotor epilepsy.

Dr. Maier Tucher, M.D., testified at trial that Summerlin suffered from an explosive personality disorder that results in rage at the least provocation. (Tr. 7/8/82, at 23-24.) Dr. Tuchler also

testified about Summerlin's learning disability; because Summerlin was dyslexic, he had not learned to read. (*Id.* at 23.) Based on a pre-trial examination, Dr. Tuchler reported that Summerlin was "functionally mentally retarded" because of his lack of literacy, organic disability, impaired impulse control, and anti-social personality. (Tr. 1/28/29/30/85, at 6-7.)

The presentence report indicated that Summerlin's father had served 15 years of a life sentence for armed robbery during Summerlin's early childhood and was divorced from Summerlin's mother while in prison. (1982 Presentence Rep. at 6.) The report stated that Summerlin was killed 1975 in a police shoot-out. (*Id.*) The report also noted that Summerlin's mother was an alcoholic who never provided training or guidance for him and was "always beating" him. (*Id.*) The report also stated that Summerlin had been diagnosed as a "paranoid schizophrenic" and had been prescribed thorazine. (*Id.* at 7.) Additionally, the report discussed the fact that Summerlin's learning disability caused him to drop out of school in the seventh grade, and that he suffered from dyslexia and consequently was illiterate. (*Id.* at 6.)

The presentence report included Summerlin's criminal history. (*Id.* at 4-5.) Although the Ninth Circuit majority characterized it as relatively insignificant, the presentence writer found Summerlin's juvenile and adult record "extensive." (*Id.* at 8.) Thus, the Ninth Circuit's conclusion that Summerlin's criminal history was "not presented at the penalty phase" is not supported by the record. (Appendix A, at 30.)

Dr. Tatro's psychological report, which was attached to the presentence report, discussed Summerlin's physical and mental abuse at home, his organic brain dysfunction, his impulsive overreactions to emotionally arousing events, his paranoid view of life and feelings, his organically diminished capacity for self-control, his great impulsivity, and his borderline personality disorder. Dr. Tatro concluded that because of mental impairments, Summerlin was "unaware of the motives underlying much of his behavior." (1981 Rep., at 3-7.) Dr. Tatro expressly stated that Summerlin's "highly

"unstable and volatile actions" should be considered in mitigation. (*Id.* at 7.)

The Ninth Circuit majority discounted Dr. Tatro's evaluation because it was prepared before trial on the issue of sanity, rather than for the penalty phase. (Appendix A, at 32.) However, when the report was prepared does not change the mitigating nature of its contents or the fact that it was before the court at the time of sentencing. Furthermore, by relying at sentencing on Dr. Tatro's previously submitted report, Summerlin was able to place the information in the report before the trial court without subjecting it to cross-examination.

Thus, at time of sentencing, the record before the trial court contained—in a manner that did not subject the mitigation to cross-examination—all the mitigation evidence the *en banc* court majority listed, except for information relating to alleged electroshock treatments and punishment involving ammonia fumes.

Evidence Before the Court at the Post-Conviction Hearing

In 1985, following the direct appeal, the trial court held a multi-day evidentiary hearing on Summerlin's ineffective assistance claims, and Summerlin more extensively developed evidence he believed should have been presented at sentencing. For example, Summerlin presented testimony from Dr. Tuchler, who emphasized Summerlin's organic disability resulting in his being "functionally mentally retarded," his extremely impaired impulse control because of his explosive-type personality disorder, and his personality disorder. (Tr. 1/28/29/30/85, at 6-8.)

Dr. García-Bunuel testified that Summerlin had indicated he had been hit in the head in 1969 by a food tray and was unconscious for a short while, and that, in 1980, he was in a car accident. However, Dr. García-Bunuel observed that the scars on Summerlin's head did not suggest Summerlin's skull had been fractured. (*Id.* at 51.) Among other topics, Dr. García-Bunuel testified concerning the medication prescribed for Summerlin. (*Id.* at 81, 99-100.) Dr. García-Bunuel offered the opinion that, if the victim had been sexually assaulted, as the jury found, in all probability Summerlin was